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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/565,983	02/21/2006	Jun Nakamura	OHA-059	9456
33628 7590 02/03/2009 KANESAKA BERNER AND PARTNERS LLP 1700 DIAGONAL RD SUITE 310 ALEXANDRIA, VA 22314-2848				
EXAMINER				
HANCE, ROBERT J				
ART UNIT		PAPER NUMBER		
2421				
MAIL DATE		DELIVERY MODE		
02/03/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No. 10/565,983	Applicant(s) NAKAMURA ET AL.
Examiner ROBERT HANCE	Art Unit 2421

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 21 January 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.
NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).

5. ☐ Applicant's reply has overcome the following rejection(s): _____.

6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: _____.

Claim(s) objected to: _____.

Claim(s) rejected: _____.

Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).

9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.

12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____

13. ☐ Other: _____.

/John W. Miller/
Supervisory Patent Examiner, Art Unit 2421

/ROBERT HANCE/
Examiner, Art Unit 2421

Continuation of 11, does NOT place the application in condition for allowance because: Applicant's arguments, see Response to the Final Action filed 01/21/09, are not persuasive.

Applicant states on page 2 of the Response that "the 'enhancement layer' in Zhu et al. corresponds to 'either one of the divided image files' in claim 1 of the present invention, and that the 'base layer' corresponds to the 'data of the CM file'." Examiner respectfully submits that Applicant has misinterpreted the rejection of claim 1 in the Final Action. It was AAPA, not Zhu, that was relied upon to teach dividing a moving image file. The Zhu reference teaches that the enhancement layer of a video file is encrypted using data from the base layer. In the combined system of Berkson, Zhu and AAPA, both of the divided video files contain base and enhancement layers, and the enhancement layers of both are encrypted using data from the base layer. In further modifying this combined system with the teachings of Nelson, advertisement data is present in the base and enhancement layers, and the base layer is used to encrypt the enhancement layer, therefore the video is encrypted using CM file data.

Applicant argues on page 3 of the Response that "in claim 1, there is no enhancement layer, and also, the enhancement layer is not encoded by some data included in the base layer." While this is true, it does not preclude the combination of references cited in the Final Action from rendering obvious the limitations of claim 1.

Applicant argues on page 4 of the Response that in Nelson, commercials are multiplexed with the video, therefore Nelson fails to teach encrypting the video using advertisement data. Examiner agrees, but asserts that Nelson was not relied upon to teach encrypting the video file based on the CM file. Nelson was relied upon to show video data which uses base and enhancement layers with advertisements in the video. Nelson therefore teaches that there is CM file data in the base layer. The combination of Nelson and Zhu, who teaches encrypting enhancement layers using data from the base layer, teaches encrypting video using CM file data, due to the fact that there is CM file data in the base layer.

Applicant further argues on page 4 of the Response that "it is not disclosed or suggested in Nelson et al. how the video image including the CM data is divided or included in one of the two not-reproducible moving image files." In the combined system cited in the Final Action, AAPA teaches dividing the video into two not-reproducible files, and Nelson teaches that there is CM data in the file. Therefore there is CM data included in one of the two divided files.

Applicant argues on pages 4-5 that Zhu does not disclose that the enhancement layer is encrypted by CM file data. This was taught by the combination of Zhu and Nelson, as described above.

Applicant argues on page 5 that the CM data may be included in the enhancement layer, not the base layer, therefore it could be possible that the enhancement layer is not encrypted using CM data. Examiner respectfully disagrees. Nelson teaches that graphics, such as station identifications (CM data) may be overlaid on the video data. Therefore, the CM data is a part of the video. As taught by Zhu, and as is well known in the art, the enhancement layer is used to increase the quality of the video by adding a fine-grained enhancement (see Zhu [0003]). Therefore, the CM data is present in both the base and enhancement layers, and the video will be encrypted by CM data in the combined system of Berkson, Zhu, AAPA and Nelson.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

Applicant argues on page 5 that in the instant invention, the encryption is done without considering the enhancement layer or the base layer. While this is true, it does not preclude the combination of references cited in the Final Action from rendering obvious the invention as claimed in claim 1.

Applicant further argues on page 5 that "the CM file data is not actually included in the other of the divided moving image files." Examiner asserts that the invention as claimed in claim 1 does not preclude the advertisement from being present in both of the divided moving image files.

Applicant states that "none of the cited references indicates that the CM file data is used for encryption." While this is true, it is the combination of the references which teaches that CM file data is used for encryption, as described above. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986)..